SUPREME COURT U. S.

Supreme Court, U. S.
FILED
FEB 28 1974
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-732

DOUGLAS DALE SUTTER, PETITIONER

v.

UNITED STATES OF AMERICA

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

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REPLY TO
RESPONDENT'S MEMORANDUM IN OPPOSITION

I. RESPONDENT HAS MISINTERPRETED THE COURT'S LIMITING INSTRUCTION TO THE JURY.

In charging the jury, the Court stated the burden was on the Government to prove three elements:

> First, the defendant possessed the marijuana with the intent to distribute;
>
> Second, that the defendant did such act knowingly or intentionally; and,
>
> Third, that the substance alleged is in fact marijuana.
>
> As to this last element, the nature of the substance, let me remind you that during the trial the parties entered into a stipulation that a qualified chemist would testify that the substance was marijuana. Thus, of the three elements of the crime charged in the Indictment, two remain for your determination as the sole judges of the facts in the case:
>
> First, did the defendant possess the marijuana with the intent to distribute, and second, did the defendant do such act knowingly or intentionally.

> In this connection, ladies and gentlemen, I instruct you that you may not find the defendant guilty of the offense charged based upon his possession of the three marijuana cigarettes found in his shirt pocket. That evidence was admitted for one purpose and one purpose only, and that was as circumstantial evidence of his knowing and intentional possession of the other marijuana in the trunk. (Tr. 57-58).

The Court's limiting instruction related only to the second element to be proved. The Court clearly expressed its position during the hearing in chambers to discuss jury instructions. The following exchange occurred during the hearing:

> THE COURT?
>
> . . . . . .
>
> And I'll give them another instruction that the possession in the shirt pocket of the three marijuana cigarettes is not sufficient to sustain a conviction, that they must consider that only with the other evidence in order to convict. In order to convict, they must find he knew that the other marijuana was in the trunk.
>
> MR. MOGILNER: Does that mean that you're going to instruct them that the cigarettes in the shirt pocket are to show knowledge?

> THE COURT: That it's only circumstantial proof of knowledge of the character of the contraband. (Tr. 50).

The prosecutor made no objection to the proposed limiting instruction, nor did he request an instruction that the cigarettes, and Petitioner's possession thereof, could be considered by the jury for any other purpose.

It was clearly the intent of the prosecutor and the Court to admit the cigarettes only to establish that if the Petitioner had known that 100 pounds of substance was in the trunk of the car, he would have known the substance was the narcotic marijuana. This was what Petitioner had offered to admit.

The cigarettes were not admissible on the issue of possession. All that the cigarettes could prove was that the Petitioner was more likely than not in possession of the marijuana in the trunk. This does not fall within the area of the exceptions to the general rule permitting evidence of uncharged crimes.

People -v- Lapin, 138 C.A. 2d 251, 262 (1956). At best, the cigarettes merely created a probability or suspicion that Petitioner possessed the marijuana in the trunk of the car, and this was not sufficient to uphold a conviction. Moore -v- United States, 271 F.2d 564, 568 (4 Cir. 1959). The intent referred to in Deck -v- United States, 395 F.2d 89, (9 Cir. 1968) referred to intent to defraud the United States by illegal importation, as opposed to intent to possess. Deck is inapplicable here.

The Respondent's contention that the offered stipulation would have "aided Petitioner in disavowing knowledge that the trunk of his rented car contained marijuana" exemplifies the evil complained of. Our prosecutorial system placed the burden on the Government to prove that Petitioner possessed the marijuana in the trunk. There was no burden on the accused to disavow anything, and he did

not do so since he did not testify. The Respondent sought to create a presumption of guilt through the evidentiary ploy in question. He was not entitled to enjoy the advantage gained thereby.

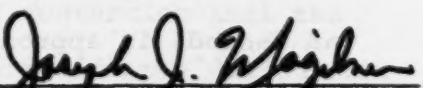
II. THE PETITIONER DID NOT DRIVE TO MEXICO.

Respondent has misread the facts on an important point. It was factually impossible for the Petitioner to have driven to Mexico on the day in question and the prosecutor, at trial, made no such contention.

Lindbergh Field in San Diego, where the car was rented, is approximately 15 to 20 miles North of the closest border with Mexico (Tr. 27) When the car was rented at Lindberg Field, the odometer reading was 12,055 miles (Tr. 31). When the car arrived at the San Clemente Check Point the odometer reading was 12,130 miles (Tr. 44) indicating that it had been driven 75 miles since rented. It was stipulated that it is approximately 60 to 61 miles from

Lindbergh Field to the San Clemente Check Point (Tr. 45). The Petitioner would have had to have driven at least 91 miles if he had gone from Lindbergh Field to the Mexican Border and then to the San Clemente Check Point. Since the odometer reading on the car indicated it had only traveled 75 miles, the Petitioner could not have gone to Mexico. There was no testimony indicating that Petitioner had been to Mexico and the prosecutor did not suggest he had been there.

Respectfully submitted,



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February 25, 1974.